

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No. : A83/13

In matter between:

TSHOLOFELO MOSES KGANARE

Appellant

and

THE STATE

Respondent

CORAM:

RAMPAL, AJP *et* MONALEDI, AJ

HEARD ON:

25 NOVEMBER 2013

JUDGMENT BY:

THE COURT

DELIVERED ON:

23 JANUARY 2014

- [1] This is an appeal against the sentence only. The appellant stood trial in the Bloemfontein Regional Court on two counts of robbery with aggravating circumstances. Following his conviction he was sentenced to 10 years imprisonment in respect of each count. The trial court specifically directed that the sentences should run consecutively. The respondent supported the sentences imposed on the appellant.

[2] The appellant was aggrieved. He applied for leave to appeal against the sentence. On 7 December 2012 he was granted leave to appeal.

[3] The first charge against the appellant read as follows:

“In that upon or about 2010/01/14 and at or near Regional Division of Free State, in the unlawfully and intentionally assault one Lerato Nkwe and did then with force take the following items from her, to wit cellphone Sony Erricson W395, handbag, cash and toiletries. All valued at R2800.00 her property or property or property in her lawful possession, aggravating circumstances being that she was threatened with a screw driver which Tsholofelo put to her neck.”

[4] The second charge against the appellant read as follows:

“In that upon or about 21/ 01/ 2010 and at or near Bloemfontein, in the Regional Division of Free State, the accused did unlawfully and intentionally assault one Confidence Mtshungwane and did then and with force take the following items from her, to wit Samsung cellphone U700, wrist watch and Handbag all valued at R3 820.00 that she was threatened with a screwdriver pointed to her neck.”

[5] The appellant pleaded not guilty to both counts. He gave no explanation of his plea.

[6] The first complainant was Ms Lerato Miriam Nkwe. She testified that she met the appellant in Bloemfontein on 14 January 2010. He was operating as a taxi driver. She

stopped him and boarded his taxi. Her aim was to come to the city. The appellant deviated from the correct route under a false pretext. Instead of driving to the city, the appellant drove the other way, left the township, stopped at a secluded spot in the veld, threatened her with a screw driver and robbed her of her belongings. He then speed away from the scene of the crime.

- [7] Ms Confidence Mtshumgwane was the second complainant. By and large her version was substantially similar to that of the first complainant. The appellant used the pretty much the same *modus operandi* to get the second complainant into his seemingly pirate taxi and to lure her away. That being the case, it will serve no useful purpose to narrate it here.
- [8] The appellant elected to remain silent. Moreover, he called no one to testify on his behalf. Therefore the evidence tendered by the prosecution was unchallenged when the appellant's case was closed.
- [9] The appellant was thereafter convicted as charged on both counts of robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977. The robbery counts are listed under Part 2 Schedule 2 Act 105 of 1977 as amended.
- [10] The prescribed minimum sentence for a first offender who is convicted of robbery with aggravating circumstances is 15 years imprisonment unless there are substantial and

compelling circumstances to justify the imposition of a lesser sentence.

[11] The trial magistrate found in favour of the appellant that there were substantial and compelling circumstance which warranted deviation from the prescribed minimum sentence of 15 years imprisonment. It then deviated to the extent of 5 years in respect of each count. The appellant was therefore sentenced to 10 years imprisonment per count. The direction by the trial magistrate that the two sentences should not run concurrently practically meant that the appellant was sentenced to an effective custodial term of 20 years.

[12] Mr Nel, counsel for applicant, submitted that the effective sentence of 20 years imprisonment was shockingly severe and excessive – and thus inappropriate. Counsel submitted that the trial court failed to takes into account the extremely harsh cumulative effect of the two senteces imposed on the appellant. By so failing, counsel concluded, the trial court committed material misdirection. He then urged us to interfere.

[13] Mr Hoffman, counsel for respondent, disagreed. Counsel submitted that the trial court did not materially misdirect itself in sentencing the appellant as it did. He then articulated his argument by saying:

“12.

Die vonnis gesien is swaar, maar gegewe die omstandighede van hierdie saak was die landdros geroepe om ‘n vonnis wat werklike afskrikingswaarde het, op te lê.”

- [14] In **S v Moswathupa** 2012 (1) SACR 259 (SCA) at 263g it was stated:

“When dealing with multiple offences a court must not lose sight of the fact that the aggregate penalty must not be unduly severe.”

See also **S v Muller** 2012 (2) SACR 545 (SCA) at 549d and **S v Kruger** 2012 (1) SACR 369 (SCA) at 373b-c.

- [15] Ordering two or more sentences to be served concurrently is a convenient method of ensuring that the cumulative effect of sentences imposed on an offender is not too severe in the light of the aggregate sentence. See **S v Cele** 1991 (2) SACR 246 (A) at 248j.
- [16] In **S v Coales** 1995 (1) SACR 33 (A) at 37a-d it was stressed that the cumulative effect of the sentences imposed must be taken into account.
- [17] During the course of sentencing the appellant the trial court commented:

“You should not think I am overemphasising its seriousness. Violence has plagued and bedevilled the community of South Africa. The people are outraged by it.”

[18] The trial court laid undue emphasis on the seriousness of the offence of robbery in general and its adverse impact on the interest of society. Compare p 253: 12 – 15 record. The violence employed by the appellant in respect of each incident was so minimal that it could not be fairly described in such a strong language as used by the regional magistrate. See **S v Rabie** 1975 (4) SA 855 (A) at 861D, **S v Toms**; **S v Bruce** 1990 (2) SA 802 (A) at 806H-J.

[19] The magistrate failed to properly individualise the sentence and has failed to deal with the matter on its own peculiar facts.

“Circumstances vary and punishment must ultimately fit the true seriousness of the crime.”

See **S v Samuels** 2011 (1) SACR 9 (SCA) at 13c-d and **S v Ingram** 1995 (1) SACR 1 (A) at 8j-9a.

That salient principle was, in our view, overlooked in this matter. As with all crimes, the crime of robbery has a variety of shades and grades. See **S v Collins** 1990 (1) SACR 577 (A) at 581c.

[20] Mr Nel contended in para 3 of the applicant’s heads of argument that:

“The trial court committed the error of merely reciting the well-established principles that ought to be taken into account when determining an appropriate sentence, but failed to apply these principles to the particular circumstances in this matter. Compare: **S v Moswathupa** 2012 (1) SACR 259 (SCA) at 262e-f.”

In our view the critique was justified. The trial court failed to demonstrate that it appreciated that salient principle as laid down in **S v Collins**, *supra* and **S v Cele**, *supra* in making the direction that the appellant serve the sentences consecutively.

- [21] In the course of passing sentence the trial magistrate made some unfortunate remarks and drew some questionable inferences which could not be sustained by the proven facts. The following instances illustrate the point:

“4.4.1 ‘... you were almost a serial robber”

[Record p 253 / 21]

The appellant had no previous conviction of robbery. On the facts, he could not be fairly said to have any criminal propensity to rob.

4.4.2 ‘I do believe that had [the complainants] offered any resistance of some nature ... you could have inflicted some bodily injuries.’

[Record p 257 / 6 - 9]”

The foundation for the belief was very dubious.

- [22] Although severe, the indicents *in casu* were not associated with the level of extreme violence or loss of life that unfortunately all too often occurs in armed robberies. See **S v Muller** 2012 (2) SACR 545 (SCA) at 550c:

“The offences in question therefore cannot be regarded as falling within the upper echelons of the scale of severity.”

The same can be justly said about the offences in the instant appeal.

- [23] The only “violence” apparent during the two incidents entailed the following:

As regards the incident of **14 January 2010:**

- (i) Screwdriver against the neck of the complainant. See p4: 11 – 12 record.
- (ii) “Pushing” the complainant out of the vehicle. See p 5: 19.

As regards the incident of **21 January 2010:**

- (i) Screwdriver pointed towards the neck of the complainant. See p25: 15 – 16 record.
- (ii) Grabbing the clothes of the complainant. See p25: 22 – 23 and also p35: 22 – 24.

In brief, that was the sum-total of all the violence the appellant had inflicted on the two victims.

- [24] The value of what was stolen on each occasion was by no means at the level that is so often the case in many of the robberies which daily entertain the courts. Compare: **S v Muller** 2012 (2) SACR 545 (SCA) at 550b-c. There the loot was tens of thousands of rands. Here the total value of the loot less than R7 000,00.

In casu the two incidents were substantially less severe than those in the **Muller** case *supra*.

- [25] The following erroneous remarks by the trial magistrate regrettably created the perception that the trial court was obviously not just angry but that retribution, and retribution alone, was in the forefront of the regional magistrate's mind:

“... my offenders like you would know their targets ...” [Record p 254: 24]

“... I believe you must have committed other similar offences without a trace.” [Record 256: 21 - 22]

- [26] In our view the trial court overplayed the magnitude of the crime and overstressed the interest of society at the expense of the appellant's person as an individual in conflict with the law. See **S v Mhlakaza** 1997 (1) SACR 515 (CC) at 518e-g and **S v Maseola** 2010 (2) SACR 311 (SCA) at 315a-b.

In the result we hold the firm view that the magistrate imposed a sentence that is not fair to the appellant or in the

interest of justice. See **S v Jimenez** 2003 (1) SACR 507 (SCA) at 519b and **S v L** 1998 (1) SACR 463 (SCA) at 468f – j. The cumulative sentence is not commensurate to the magnitudes of the crimes committed.

[27] In sentencing the appellant the following mitigating factors and the value to be attached to each of them were of vital significance:

- He was 26 years old.
- He was unmarried.
- He completed standard 8 as highest qualification.
- He was incarcerated from 21 January 2010 to 24 November 2011.
- He was a first offender.

[28] On the facts we are persuaded that the effective sentence of 20 years imprisonment or the cumulative effect of the two sentences was disturbingly severe and thus inappropriate. The trial magistrate's direction that the two sentences should run consecutively constituted a material and appealable misdirection. In view of such a misdirection, appellate interference is warranted. It is our respectful view that 4 years of the sentence imposed in connection with the second charge should run concurrently with the sentence imposed in connection with the first charge. An effective sentence of 16 years imprisonment appears to us to be fitting and appropriate punishment for the appellant.

[29] Accordingly we make the following order:

- 29.1 This appeal succeeds;
- 29.2 The conviction stands unchallenged;
- 29.3 The two individual sentences of 10 years imprisonment are confirmed;
- 29.4 The direction by the trial court that the two sentences should run consecutively is set aside and substituted with the direction stated below;
- 29.5 The 4 years of the sentence imposed in respect of the second count shall run concurrently with the sentence imposed in respect of the first count;
- 29.6 The appellant shall accordingly serve an effective sentence of 16 years imprisonment which shall be deemed to have been imposed on 24 November 2011.

M.H. RAMPAL, AJP

S.R. MONALEDI, AJ

On behalf of the appellant:

Adv. S. J. Nel
Instructed by:
Mpobole & Partners
BLOEMFONTEIN

On behalf of the defendant:

Adv. R. Hoffman
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN